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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Siskiyou)

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ROGER GIFFORD,

Plaintiff and Appellant,

v.

ROBERT D. WINSTON,

Defendant and Respondent.

C086445

(Super. Ct. No. SCSCCVCV17961)

Plaintiff Roger Gifford appeals the trial court's dismissal of his civil action against the Hornbrook Community Services District (the District) and attorney Robert D. Winston for violations of the Brown Act and other sundry offenses. Gifford argues (1) the trial court was without jurisdiction to declare him a vexatious litigant following

his voluntary dismissal of the case (Code Civ. Proc., § 581, subd. (b)(1)),<sup>1</sup> (2) the court exceeded its authority in striking that dismissal and resetting the vexatious litigant motion without following standard motion practice, and (3) the court's decision lacked "competent substantial evidence" to support its vexatious litigant designation and negative determination concerning his likelihood of success.

We conclude the trial court had jurisdiction to consider the vexatious litigant request, the prefiling order was properly granted, and there is substantial evidence supporting the trial court's vexatious litigant designation. The judgment is affirmed.

#### FACTUAL AND PROCEDURAL HISTORY

Winston is a contract attorney retained to represent the District in the various lawsuits brought by Gifford against the District. Gifford initiated this case on August 28, 2017. On September 28, 2017, Winston brought a motion to declare Gifford a vexatious litigant, require a security deposit, and subject him to a prefiling order for any new litigation. This motion resulted in an automatic stay of the litigation (§ 391.6) that was served on Gifford the same day. The motion was set for a hearing on October 26, 2017.

Rather than respond to Winston's motion, on October 10, 2017, Gifford filed a request for voluntary dismissal of the matter without prejudice that was accepted and entered by the clerk. This dismissal was effective immediately upon entry by the clerk. (§ 581d.) The same day, Gifford filed a new action virtually identical to the first case with the exception that it added a new cause of action under the False

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

Claims Act.<sup>2</sup> Gifford did not serve Winston with the dismissal, and Winston only learned of the dismissal after appearing at the hearing set for the vexatious litigant motion.

On October 27, 2017, Winston filed and served Gifford with an ex parte application to strike Gifford's dismissal of the case and request to reset the vexatious litigant motion for November 2, 2017. Gifford filed his opposition to that request on October 30, 2017, but did not attend the November 2, 2017 hearing. The minute order from that hearing reflects that the court struck the dismissal, reset the vexatious litigant motion for November 9, 2017, and the clerk served this order on Gifford by mail the same day.

Thereafter, Gifford did not object to the date selected, request a delay of the hearing on the vexatious litigant motion, or otherwise act to oppose that motion. Nor did Gifford attend the November 9, 2017 hearing, wherein the court granted Winston's request for a prefiling order and a security deposit to continue the litigation. The clerk served the minute order from the hearing on Gifford by mail the same day. The formal prefiling order and written decision of the court were executed and filed nearly a month later on December 5, 2017. The notice of entry of these orders was served by Winston on Gifford on December 18, 2017. Gifford did not furnish the required security, resulting in

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<sup>2</sup> We grant in part Winston's request for judicial notice, recognizing the new lawsuit was filed on October 10, 2017 and the causes of action contained therein. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Johnson & Johnson* (2011) 192 Cal.App.4th 757, 768.) We deny the remainder of Winston's request, as well as Gifford's request for judicial notice, as unnecessary to our decision. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [matter to be judicially noticed must be relevant to material issue].) We further deny Gifford's request for judicial notice brought solely within the text of his briefing in noncompliance with California Rules of Court, rule 8.252(a)(1).

dismissal of the case on January 11, 2018. Gifford filed a timely notice of appeal, and this court granted his request to file and prosecute this appeal.

## DISCUSSION

### I

#### ***The Trial Court Had Jurisdiction to Consider the Vexatious Litigant Request***

Gifford argues that once the trial court entered his voluntary dismissal, it was without jurisdiction to consider anything but a request for attorney fees. However, he concedes the trial court would have had jurisdiction to entertain a motion for a prefiling order, provided that motion complied with other procedural requirements. We concur with Gifford that, consistent with the analysis of *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222-225 (*Bravo*), the court retained jurisdiction to consider a prefiling order motion.

In *Bravo*, the court rejected the argument that a request for a prefiling order is viable only in *pending* litigation. (*Bravo, supra*, 99 Cal.App.4th at pp. 222-223.) Unlike the mechanism found in section 391.1 that limits itself to “pending litigation,” nothing in the language of section 391.7 imposed a similar limit. (*Bravo*, at p. 222.) Further, the remedy afforded by the prefiling order is “directed at precluding the initiation of a meritless lawsuit and the costs associated with defending such litigation. [Citations.]” (*Ibid.*) Thus, requiring an active ongoing lawsuit would render the relief afforded by section 391.7 illusory. (*Bravo*, at p. 222.)

Relying in part on *Bravo*, another Court of Appeal has conclusively determined a trial court does not lose jurisdiction to determine a pending vexatious litigant motion by virtue of a plaintiff’s voluntary dismissal of the underlying lawsuit. (*Pittman v. Beck Park Apartments* (2018) 20 Cal.App.5th 1009, 1022-1025.) The propriety of this approach is underscored by Gifford’s actions in dismissing this case and immediately

reinstating a virtually identical lawsuit in an apparent effort to delay the hearing and ultimate ruling on the impending vexatious litigant request.

## II

### ***The Prefiling Order Was Properly Granted***

Gifford argues the trial court erred in resetting the motion because of inadequacies in the procedures utilized and the notice afforded him. We disagree.

It is clear from the record that Gifford had notice of the ex parte hearing to reset the vexatious litigant motion, as well as of the ultimate hearing on the merits.<sup>3</sup> Nonetheless, Gifford took no action whatsoever to either oppose the merits of the vexatious litigant motion or request a continuance of the reset hearing on the merits. Gifford also took no action to request any relief after he was mailed a copy of the court's minute order granting Winston's vexatious litigant request prior to the court's entry of formal orders designating Gifford a vexatious litigant subject to a prefiling order nearly a month later. Under these circumstances, Gifford has forfeited his procedural arguments that, if raised below, could have been considered and remedied by the lower court. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [reviewing court will not review assertions of procedural error that could have been but were not presented to the lower court because "it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected"].)

## III

### ***Substantial Evidence Supports the Trial Court's Vexatious Litigant Designation***

Gifford argues the incompetency of the evidence before the trial court

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<sup>3</sup> Gifford's arguments to the contrary are unsupportable in light of the clerk's attestation of service of the order setting the vexatious litigant hearing for November 9, 2017, at 8:30 a.m.

doomed Winston’s request to declare him a vexatious litigant and require security to continue the litigation. Gifford has not demonstrated the trial court erred in granting the motion.

A determination whether an individual is a vexatious litigant falls within the discretion of the trial court and will be overturned only if unsupported by substantial evidence. (*Bravo, supra*, 99 Cal.App.4th at p. 219.) “On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment.” (*Ibid.*) Questions of law concerning the vexatious litigant designation are reviewed de novo. (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1346.)

The Legislature created the vexatious litigant statutes “ ‘to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues.’ [Citations.] These persistent and obsessive litigants’ abuse of the legal system ‘not only wastes court time and resources but also prejudices other parties waiting their turn before the courts.’ [Citations.] The Legislature enacted sections 391.1 through 391.6 in 1963, to moderate a vexatious litigant’s tendency to engage in meritless litigation. [Citation.] Under these sections[,], a defendant may stay pending litigation by moving to require a vexatious litigant to furnish security if the court determines there is not a reasonable probability the plaintiff will prevail. (§§ 391.1, 391.4; [citation].)” (*Hupp v. Solera Oak Valley Greens Assn.* (2017) 12 Cal.App.5th 1300, 1311.)

Later legislation created an additional curb on vexatious litigants, a prefiling order requiring any vexatious litigant to obtain permission prior to filing any new litigation. (See *Bravo, supra*, 99 Cal.App.4th at p. 221.) This protection is codified in section 391.7, subdivision (a), that provides, “In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling

order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed.”

Here, the trial court found Gifford was a person described in section 391, subdivision (b)(1)<sup>4</sup>, and granted the prefiling order request. This decision was supported by substantial evidence. Charles Slote’s declaration filed in support of Winston’s vexatious litigant motion describes six pro per litigations filed by Gifford against various parties in Siskiyou County Superior Court and one pro per appeal filed in this court that were maintained and finally decided against Gifford within the seven years preceding the motion’s filing. (*Slotz v. Bank of America* (1993) 15 Cal.App.4th 217, 224 [seven-year period measured from date of filing of motion].) Gifford’s failure to object to this showing in the trial court has forfeited his appellate challenge to this evidence. (Evid. Code, § 353; *People v. Doolin* (2009) 45 Cal.4th 390, 448.)

Because Gifford replaced this lawsuit with a successive suit and given Gifford’s request that we reverse the trial court’s dismissal of this action only to reimpose his voluntary dismissal, we will not determine the propriety of the trial court’s imposition of a security requirement that ultimately resulted in dismissal. Gifford has not shown he was prejudiced by any alleged error. (Cal. Const., art. VI, § 13.)

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<sup>4</sup> Section 391 defines a vexatious litigant, in pertinent part, as a person who: “In the immediately preceding seven–year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person . . . .” (§ 391, subd. (b)(1).)

DISPOSITION

The judgment is affirmed. Robert D. Winston shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
HULL, Acting P. J.

\_\_\_\_\_/s/  
MURRAY, J.